BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBYN A. WILLIAMS	)	
Claimant	)	
	)	
VS.	)	
	)	
FORTRESS FINANCIAL	)	
Respondent	)	Docket No. 1,032,543
	)	
AND	)	
	)	
TWIN CITY FIRE INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the July 26, 2007, preliminary hearing Order for Compensation entered by Administrative Law Judge Brad E. Avery. Neil Dean, of Topeka, Kansas, appeared for claimant. Patricia A. Wohlford, of Overland Park, Kansas, appeared for respondent and its insurance carrier.

The Administrative Law Judge (ALJ) found that claimant suffered an accidental injury that arose out of and in the course of her employment with respondent. Accordingly, the ALJ ordered respondent to pay temporary total disability compensation commencing May 29, 2007, until further order or until claimant is certified as having reached maximum medical improvement (MMI), released to her regular job, or returned to gainful employment. The ALJ also ordered medical treatment to be paid by respondent with Drs. Lynn Ketchum and Steve Simon until further order or until claimant reaches MMI.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the July 26, 2007, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent contends that the ALJ erred in finding that claimant's current complaints, symptoms, and need for treatment arose out of and in the course of her employment. Respondent points out that claimant was working a second job from April 2006 through November 29, 2006, the same period of time she is claiming an injury while working for respondent. Respondent asserts that the ALJ did not set out a date of accident in his order, did not address the impact of claimant's second job on her injuries, and did not identify the causal connection between the conditions of her work at respondent and the resulting injury. Respondent requests that the Board reverse the ALJ's preliminary Order for Compensation.

Claimant has not filed a brief in this appeal.

The issue for the Board's review is: Did claimant sustain an injury that arose out of and in the course of her employment with respondent?

FINDINGS OF FACT

Claimant began working for respondent as a loan processor in June 2005. She first noticed pain when she was reorganizing files for respondent in March 2006, although she cannot give a specific date of when she felt the first twinges of pain. The files had been filed from Z to A, and her supervisor wanted them filed from A to Z. While she was making that change, she was asked to go through each file and extract pertinent information from each and to make sure each file contained certain documents. This required her to do a lot of fingering and writing. After she went through the 200 files, she was asked to set up a client data base with telephone numbers. During her work on that project, she noticed pain in her forearms, wrists and hands. After the project was completed, the pain did not go away, and she noticed it was aggravated by her work activities. She started feeling a lot of pain in April.

Claimant started working for Joe Swartz, a real estate agent with Remax, in mid-April 2006. Mr. Swartz is married to Kellee Thiessen, claimant's supervisor at respondent, and has his office in the same building as respondent. Claimant worked for Remax and respondent simultaneously until November 2006, when she was fired by Mr. Swartz because of her restrictions. Claimant had a phone for respondent and one for Remax in her office. There was very little writing required in her job with Remax. She did filing for both companies, but the filing for Remax was minimal. She would work on one of respondent's files and then grab a Remax file, make a phone call, put it back, and then work on another one of respondent's files. She worked about five to ten hours a week for Remax. The rest of her time she worked for respondent. The work she did for Remax was similar to the work she did for respondent but most of the repetitive work she did was for respondent. Claimant said that her work for Remax did not aggravate her condition any

more than regular daily living activities, because most of the time all she did was answer the phone.

In August 2006, claimant talked to Ms. Thiessen about the pain she was having in her arms. She asked to see a doctor, and respondent sent her to Dr. Brian Divelbiss, who gave her restrictions and ordered physical therapy. She was later referred to Dr. Lynn Ketchum, who suggested further physical therapy, lessened the number of hours she worked to 35 per week, and gave her restrictions. Dr. Ketchum performed surgery on her right hand on January 5, 2007, and on her left hand on March 1, 2007. Initially, the surgeries provided relief from the pain in the area below her thumbs. However, her left thumb has since swollen back up. Not using her arm for six weeks after surgery provided relief from the overuse syndrome in her forearms, but as soon as she was able to use her arms again for daily activities, they started to swell again and the pain returned. Physical therapy was not making the overuse syndrome any better so it was discontinued in May 2007.

Claimant has not been back to work since mid-December 2006. Respondent has not asked her to return. She received her last check for temporary total disability compensation on May 28, 2007. Her work restrictions have not changed, and claimant has kept respondent informed of her continued work restrictions. Claimant currently has continuous pain in her forearms. On the left hand, she has recurrent swelling around the surgical site. Her pain increases with movement. Nothing she did outside work caused her injury to her hands and arms. She has not worked anywhere since leaving respondent, other than she volunteered at the Expocentre in the concession stand for a fund raiser for her brother's band. She volunteered four different days, about two to three hours each day.

Claimant has a computer but does not spend time on it on a daily basis, spending only an hour or two a week on it. She has dictation software that allows her to use her computer hands free. She also has a cell phone with a text messaging plan. She only sends very short text messages and spends about one or two minutes a day doing that. She has slowed down her text messaging because of the pain but did not do a lot of it before the onset of her symptoms. When she sends text messages now, she does not use her thumbs and often uses pens to push the buttons.

Although Dr. Ketchum's records do not specifically set out an opinion on causation, he does state: "At this time, all signs point to overuse syndrome . . . ."[1]

[1] P.H. Trans., Cl. Ex. 1 at 1.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[2] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[3]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[4]

K.S.A. 44-503a states:

> Whenever an employee is engaged in multiple employment, in which such employee performs the same or a very similar type of work on a part-time basis for each of two (2) or more employers, and such employee sustains an injury by accident which arose out of and in the course of the multiple employment with all such employers, and which did not clearly arise out of and in the course of employment with any particular employer, all such employers shall be liable to pay a proportionate amount of the compensation payable under the workmen's compensation act as follows: Each such employer shall be liable for such proportion of the total amount of compensation which is required to be paid by all such employers, as the average gross weekly wages paid to the employee by such employer, bears to the total average gross weekly wages paid to the employee by all such employers, determined as provided in subsection (b) (7) of K.S.A. 44-511, as amended.

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[2] K.S.A. 2006 Supp. 44-501(a).

[3] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

[4] *Id.* at 278.

"In this jurisdiction it is not essential that the duration of disability or incapacity of a workman be established by medical testimony."[5] "A workers compensation claimant's testimony alone is sufficient evidence of the claimant's physical condition."[6]

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[8]

ANALYSIS

The record does not establish that claimant's job with respondent was part time or that the claimant's injury arose out of multiple employment. Claimant worked full time for respondent from June 2005 through December 19, 2006, when she was taken off work because respondent could not accommodate her restrictions. She also worked part-time for Remax from April 2006 until November 2006. Claimant's injuries were the result of repetitive use of her upper extremities. Claimant described her job duties with respondent, with Remax, and her activities of daily living. By far, the most strenuous and repetitive gripping, grasping, lifting and other such uses of her hands and arms were during her work with respondent. The onset of her symptoms occurred while she was working for respondent and during a time when her filing activities had increased there. The mechanism of injury primarily occurred during claimant's work with respondent. Claimant relates her injuries to performing her work duties at respondent. There is very little evidence to the contrary, and no contrary expert medical opinion.

CONCLUSION

Claimant suffered personal injury by accident arising out of and in the course of her employment with respondent.

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[5] *Hardman v. City of Iola*, 219 Kan. 840, 845, 549 P.2d 1013 (1976).

[6] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, Syl. ¶ 2, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

[7] K.S.A. 44-534a.

[8] K.S.A. 2006 Supp. 44-555c(k).

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order for Compensation of Administrative Law Judge Brad E. Avery dated July 27, 2007, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October, 2007.

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BOARD MEMBER

c: Neil Dean, Attorney for Claimant
Robyn A. Williams, 1226 SW Medford, Topeka, Kansas, 66604
Bruce Brumley, Attorney at Law
Patricia A. Wohlford, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge